**IN THE SUPREME COURT OF FLORIDA**

**Case No. 77,352**

On Appeal From The Florida Public Service Commission

**CITY OF HOMESTEAD,**

Appellant,

v.

**FLORIDA PUBLIC SERVICE COMMISSION,**

Appellee.

# REPLY BRIEF OF APPELLANT CITY OF HOMESTEAD

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## REPLY ARGUMENT

In its Initial Brief, the City argued that the PSC erred in ruling that the City has no right to terminate the 1967 territorial agreement because (a) the agreement is a contract; (b) under principles of Florida contract law, which are incorporated into the agreement as if expressly set forth among its terms, a contract containing no definite duration is terminable at will by either party after a reasonable time upon giving reasonable notice; (c) although the agreement required the approval of the PSC, no statute or decision authorized the PSC to deprive the City -- then a non-regulated party -- of its contractual right to terminate the agreement upon giving reasonable notice; (d) the 1974 legislative amendment that granted the PSC regulatory jurisdiction over territorial agreements of municipally owned utilities did not authorize the deprivation of the City's right to terminate the agreement, but specifically provided that it would not alter such existing agreements; (e) even if the statutes purported to authorize the PSC to alter the agreement, this Court has repeatedly held that the constitutional prohibition against impairment of contracts forbids such an exercise of the police power, particularly with respect to the right to cancel or terminate an agreement, absent a showing of overriding public necessity; and (f) there is no overriding public necessity to deny termination of this agreement because the PSC still retains the ultimate authority to approve any renegotiated agreement or to resolve any resulting territorial dispute.

The PSC and FPL do not dispute that if the 1967 territorial agreement was a contract, then under principles of Florida contract law in existence at the time of its execution the agreement was terminable at will by either party after a reasonable time and upon giving reasonable notice. E.g., Sound City, Inc. v. Kessler, 316 So.2d 315, 318 (Fla. 1st DCA 1975); Florida-Georgia Chemical Co. v. National Laboratories, Inc., 153 So.2d 752, 754 (Fla. 1st DCA 1963). Nor do the PSC and FPL take issue with the principles, confirmed by this Court's decisions in Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975), and Park Benziger & Co. v. Southern Wine & Spirits, Inc., 391 So.2d 681 (Fla. 1980), that a party's right to terminate a contract is constitutionally protected, that virtually no degree of contract impairment is tolerated in Florida, and that even a valid exercise of the state's police power cannot overcome the constitutional protection against impairment of the right to terminate a contract absent an overriding public necessity.

The PSC and FPL nonetheless assert that the City is not entitled to terminate the agreement, but is perpetually bound thereby unless and until it can prove that modification is necessary in the public interest because of changed circumstances not present in the original proceeding. As grounds for this conclusion, the PSC and FPL offer essentially two arguments--first, that the agreement is not a contract but only a PSC order, which the City cannot terminate; and second, that to allow termination by the City would be contrary to an overriding public interest in maintaining the PSC's authority to assure adequate,

efficient, and non-duplicative electric services. Both of these contentions miss the mark and are demonstrably meritless.

**(a) The PSC's Order Approving The Territorial Agreement Did Not Destroy The Contract, But Adopted And Incorporated Its Terms, Including The Right To Terminate.**

The PSC and FPL initially contend that the City never acquired any contractual rights because the territorial agreement is not a contract but only a PSC order. Relying on this Court's declaration in City Gas Co. v. People Gas System, Inc., 182 So.2d 429, 436 (Fla. 1965), that a territorial agreement is not valid until approved by the PSC, and taking their cue from this Court's language in Public Service Commission v. Fuller, 551 So.2d 1210, 1212 (Fla. 1989), that the agreement "has no existence apart from the PSC order approving it" but "merged with and became a part of" that 1967 order, the PSC and FPL treat the contractual agreement as a kind of convenient fiction that simply vanishes once approved. Under their interpretation, the PSC approval order does not validate the contract, but destroys it.

The theory that there is not and never was a contract between the City and FPL poses several problems. For one, it is irreconcilable with the fact that in 1988, after the City gave notice of termination, FPL sought and obtained from the PSC a declaratory statement that the 1967 territorial agreement is a valid binding contract [A 20, 22-23]. For another, it is clear that because the City was not subject to PSC regulatory jurisdiction in 1967, the PSC had no authority to make the territorial agreement binding and enforceable against the City except by

virtue of the City's contractual commitment. Moreover, the very notion that the PSC had the power to approve territorial agreements necessarily presupposes that there was an "agreement" to approve.

In any event, the fundamental flaw in the view advanced by the PSC and FPL is that it misconceives the effect of the PSC approval order. Even assuming that the territorial agreement was not valid prior to its approval by the PSC, the effect of that order was to confirm and validate the terms of the agreement--including the rights of the parties to terminate the agreement. In fact, nothing in Order No. 4285 states or even suggests that the PSC intended to alter the terms of the territorial agreement in any respect.

As noted in the Initial Brief, this Court's observation in Fuller that the agreement "has no existence apart from the PSC order approving it" does not mean that it has no existence at all; and the further declaration that the agreement "merged with and became a part of" the PSC approval order does not mean that the agreement disappeared. Just as when a settlement agreement between litigants is approved by a court, or an operating agreement between licensees is approved by a regulatory agency, the effect is to adopt and incorporate the terms of the agreement into the approval order.

In this case, the terms of the territorial agreement included, by operation of Florida law, the right of each party to terminate the agreement after a reasonable time upon giving reasonable notice. There is no question but that if a ter-

ritorial agreement contains an express provision defining the duration of the contract as twenty years, or simply allows either party to terminate after twenty years, the approval of that agreement in a PSC order does not mean that at the end of twenty years the parties must return to the PSC and prove a public necessity before the agreement is terminated. Nor does it require that the PSC modify or withdraw its approval order. Indeed, to extend the duration of such an agreement or impose conditions on its termination would require a modification of the PSC's order to alter the provisions of the agreement as approved.

The City submits that the present facts compel the same conclusion. When the PSC approved this territorial agreement, the terms of the agreement -- including the termination rights that must be regarded as if expressly set forth therein by operation of Florida law -- became a part of the PSC approval order. To change the terms of the agreement by abrogating or imposing more onerous conditions on the right to terminate, the PSC must modify its approval order. As the PSC and FPL have repeatedly emphasized, such a modification can only be made upon a specific finding, after notice and a hearing, that it is necessary in the public interest based on changed conditions. The record here reflects no basis to support the transformation of the City's termination rights under the agreement as approved by the PSC.

(Conversely, if the Court holds that the City's right to terminate the agreement was somehow nullified by the PSC's approval order, then the Court should also recognize that FPL's

right under Paragraph 6 to continue serving areas subsequently included within the City limits was likewise eradicated. The City understood when it entered into the agreement that it would have the right to terminate the contract upon reasonable notice, without any requisite showing of good cause or other condition precedent. It was only in contemplation of that unconditional right to terminate that the City made the concession to FPL that the subsequent inclusion of FPL service areas within the City limits would not alone constitute a basis for modifying territorial boundaries.

If the attachment of PSC jurisdiction transformed the agreement from one that was terminable at will into a PSC order that could only be modified or withdrawn upon a showing of necessity due to changed circumstances, then the City should be permitted to rely on enlargement of the City limits as a change in circumstances. To hold otherwise would allow FPL to retain the benefit of the bargain while depriving the City of its corresponding contractual right.)

As an alternative theory to support the ruling below, FPL argues at length about the PSC's "jurisdiction." FPL contends that even though the City was not subject to PSC regulation prior to 1974, it "waived" any objection either by submitting the agreement for PSC approval in 1967, or by acknowledging the PSC's jurisdiction over the agreement in the 1979 Accursio suit. The City does not dispute that the PSC has "jurisdiction" over the agreement, because (as explained in the Initial Brief) the 1974 amendments to chapter 366 effectively

transferred such jurisdiction to the PSC -- five years prior to the Accursio suit. The issue, however, is not whether the PSC has "jurisdiction" over the agreement, but whether it has the power to unilaterally alter the terms of the agreement by abrogating or imposing conditions on the right to terminate.

In that respect, the 1974 legislation extending PSC jurisdiction to territorial agreements of municipally owned electric utilities expressly provided that "nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements." Ch. 74-196, §1, Laws of Fla. FPL posits that this savings language "is nothing more than a specific grandfathering of the Commission's [pre-1974] orders approving territorial agreements" -- and the City does not disagree. The PSC's 1967 order approving the territorial agreement did not purport to alter its terms in any respect, and therefore the 1974 legislation simply carried that agreement forward with its original terms intact -- including the termination rights that became a part of the agreement by operation of law.

The real issue is whether the 1974 legislation conferring jurisdiction over municipally owned electric utilities authorized the PSC to materially alter the terms of the 1967 agreement, as approved in Order No. 4285, by nullifying the right to terminate upon reasonable notice. The City maintains that no such modification was permissible because (a) the 1974 legislation itself provided that it should not be construed to alter existing territorial agreements, and (b) even if authorized by

the statute, the modification of the territorial agreement as approved by Order No. 4285 would amount to an impairment of the contract, which is constitutionally prohibited absent some overriding public necessity.

**(b) No Overriding Public Necessity Justifies Denial Of The City's Right To Terminate.**

FPL contends that the Commission's regulatory authority to assure adequate and efficient electric service would be defeated or diminished if the City is allowed to terminate the 1967 agreement, and thus the need to avoid such a limitation on the PSC's control "represents an overriding necessity for the State to exercise its police power." [FPL Br. at 22.] The PSC likewise argues that to allow termination of the agreement by the City would be "tantamount to finding it has the unilateral authority to terminate a Commission order," which would "wrest control of division of territory from the Commission and deliver control to the parties involved." [PSC Br. at 12.]

As explained in the City's Initial Brief, however, acknowledging the City's right to terminate this 24-year-old territorial agreement and thereby compel FPL to renegotiate will in no way diminish the PSC's regulatory authority. If the City and FPL are able to reach a new territorial agreement, that agreement must be submitted to the PSC for approval under section 366.04(2)(d) and Rule 25-6.0440 of the Florida Administrative Code; if negotiations fail to produce a new agreement, any resulting territorial dispute will be resolved by the PSC pursuant to section 366.04(2)(e) and Rule 25-6.0441. In either

event, the PSC has the power to disapprove any division of territory or other arrangements that are deemed to be incompatible with the public interest.

The arguments of the PSC and FPL regarding the potential adverse effect of termination on the PSC's duty to regulate "the planning, development, and maintenance of a coordinated electric power grid" appear to rest on the erroneous assumption that all electric service areas must be subject to a territorial agreement approved by the PSC. Florida law does not require such agreements, and not all service areas in this state are so divided. In fact, as discussed in the City's Initial Brief at page 10, the 1991 Legislature considered but did not enact proposed legislation that would have authorized the PSC to certify an approved exclusive service area for each electric utility in Florida and to modify existing agreements under certain conditions.

Thus, the termination of this territorial agreement would not undermine the authority of the PSC and create a condition that is unlawful, or uncontrollable, or even unusual. It would merely compel FPL to renegotiate a 24-year-old territorial agreement that no longer bears a proper relation to the needs of the people in the Homestead area. Certainly, FPL's interest in retaining its present service area based on the 1967 agreement, and avoiding the need to demonstrate that the old division of territory is still appropriate, does not constitute an overriding public necessity for depriving the City of its contractual right.

## CONCLUSION

The PSC and FPL have failed to demonstrate a tenable basis for the dismissal of the City's petition and consequential deprivation of the City's right to terminate the 1967 territorial agreement. Accordingly, for the reasons discussed in the City's Initial Brief and the foregoing Reply Brief, the PSC's order should be reversed and remanded with directions to determine the reasonableness of the notice of termination given by the City to FPL, and, unless the notice is deemed unreasonable, to declare the Agreement terminated and Order No. 4285 withdrawn.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by United States mail to J. Christian Meffert, Bryant, Miller & Olive, P.A., 201 S. Monroe St., Suite 500, Tallahassee, FL 32302; to K. Crandal McDougall, Florida Power & Light Company, P.O. Box 029100, Miami, FL 33102-9100; and to Susan F. Clark, Florida Public Service Commission, 101 E. Gaines Street, Room 226, Tallahassee, FL 32301, this 11th day of July, 1991.

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